12-29-2011

McDermott v. State Respondent's Brief Dckt. 38288

IN THE SUPREME COURT OF THE STATE OF IDAHO

JASON RYAN MCDERMOTT,	)	
	)	
Petitioner-Appellant,	)	NO. 38288
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jason Ryan McDermott appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

The state charged McDermott with, and a jury convicted him of, first-degree murder and conspiracy to commit first-degree murder, with a sentence enhancement for the use of a firearm in the commission of the murder. (R., p.351.) Although the state sought the death penalty, the jury could not reach a unanimous verdict on the statutory aggravating circumstances. (Id.) Consequently, sentencing was left to the discretion of the district court, which imposed fixed life sentences for both the murder and conspiracy charges with an additional ten year fixed term for the enhancement. (Id.) McDermott appealed his sentences and the Idaho Court of Appeals affirmed in an unpublished opinion. (Id.)

McDermott filed a timely *pro se* petition for post-conviction relief. (R., pp.4-330.) McDermott also filed a motion for appointment of counsel, which the district court granted. (R., pp.343-345, 350.) The district court also issued a notice of intent to dismiss McDermott's petition. (R., pp.351-378.) McDermott, with the assistance of counsel, filed an objection to the court's notice in which he asserted summary dismissal was not appropriate, although he did not respond to the specific reasons for dismissal set forth in the court's notice. (R., pp.391-392.) In his response, McDermott also asked the court to include, in the record of his

post-conviction case, "the official record in the trial proceeding consisting of the trial transcripts, transcripts of each hearing held in the substantive case, along with all exhibits at the time of trial, all of the court file, and all sentencing materials."[1] (R., p.392.)

The court held a hearing at which post-conviction counsel asked the court to "consider the matter fully submitted and to . . . make its decision based on the record that's presently been filed," but also requested another status conference so that he could confirm McDermott did not wish to provide any supplemental information to support his petition. (Tr., p.8, L.19 – p.9, L.2; p.10, L.23 – p.11, L.3.) The court granted the request. (Tr., p.11, Ls.8-25.) At the status conference, McDermott requested an evidentiary hearing based on the information contained in his pleadings. (Tr., p.13, Ls.16-19; p.13, L.24 – p.14, L.2.) The court took the matter under advisement and subsequently entered an order dismissing McDermott's petition for the reasons set forth in its prior notice, concluding McDermott failed to "show that material facts exist as to each element of the claims" raised in his petition. (R., p.394.) McDermott timely appealed. (R., pp.396-398.)

Although counsel was appointed to represent McDermott on appeal, counsel filed a motion to withdraw after concluding he could not "represent Mr.

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[1] The Idaho Supreme Court also granted McDermott's motion on appeal to take judicial notice of the "Clerk's Record and Reporter's Transcripts in Supreme Court Docket No. 32071-2005, *State v. McDermott.*" (Order dated November 15, 2011.) The Court's order, however, excluded judicial notice of the Presentence Report from McDermott's underlying criminal case because "it was previously returned to the district court with the original exhibits as well as the Remittitur." (Id.)

McDermott and comply with IAR 11.2." (Motion To Withdraw As Counsel Of Record And To Allow Appellant To Proceed *Pro Se*; Affidavit of Dennis Benjamin In Support Of Motion To Withdraw As Counsel Of Record And To Allow The Appellant To Proceed *Pro Se*.) The Court granted that motion. (Order dated November 15, 2011.)

ISSUES

McDermott states the issues on appeal as:

A) Did the District Court violate McDermott's Due Process rights of Art. I § 13 of Id. Const. and 5th and 14th Amends. of U.S. Const., when it arbitrarily and summarily dismissed his Post Conviction Relief Petition?

B) Do the claims raised in McDermott's Post Conviction Relief Petition show the existence of material facts necessary to warrant an Evidentiary Hearing, a vacation of his conviction, or a vacation of his sentence?

(Appellant's Brief, p.9 (verbatim).)

The state rephrases the issue on appeal as:

Has McDermott failed to establish error in the summary dismissal of his petition for post-conviction relief?

ARGUMENT

McDermott Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition

A. Introduction

McDermott contends the district court erred in summarily dismissing his post-conviction petition asserting the failure to conduct an evidentiary hearing on his petition denied him his right to due process. (Appellant's Brief, p.12.) McDermott also appears to separately assert that he raised a genuine issue of material fact warranting an evidentiary hearing on his newly discovered evidence claim. (Appellant's Brief, p.14.) Both of McDermott's arguments fail. First, McDermott has no due process right to an evidentiary hearing in a post-conviction case; rather, the court may, pursuant to I.C. § 19-4906(b) summarily dismiss a post-conviction petition without a hearing. Second, McDermott has failed to articulate why the district court erred in summarily dismissing his petition or otherwise establish there was a genuine issue of material fact entitling him to an evidentiary hearing on his newly discovered evidence claim, or any other claim raised in his petition. McDermott has failed to establish error in the summary dismissal of his petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any

affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. McDermott Has Failed To Establish The District Court's Summary Dismissal Of His Post-Conviction Petition Violated Due Process

McDermott contends the district court violated his due process rights by summarily dismissing his post-conviction petition. (Appellant's Brief, p.12.) McDermott is incorrect. Due process only requires an individual be provided notice and an opportunity to be heard when he is facing deprivation of a liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause. Smith v. State, 146 Idaho 822, 828, 203 P.3d 1221, 1227-1228 (2009); State v. Rogers, 144 Idaho 738, 740-741, 170 P.3d 881, 883-884 (2007). There is no liberty or property interest at stake in post-conviction requiring due process protection. The impairment on McDermott's liberty arose as a result of his conviction and McDermott was afforded all the process he was due by virtue of his criminal trial. See District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, ___, 129 S.Ct. 2308, 2319 (2009) (The "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that [the defendant] has already been found guilty at a fair trial, and has only a limited interest in postconviction relief."); Pennsylvania v. Finley, 481 U.S. 551, 556-557 (1987) (states have no obligation to provide avenue for collateral attack such as post-conviction). Although Idaho provides a mechanism for seeking post-conviction relief, the Federal Constitution does not "dictate the exact form such assistance must assume." Finley, 481 U.S. at 559. Thus, the provision of

the Uniform Post-Conviction Procedure Act authorizing summary dismissal of a post-conviction petition without an evidentiary hearing, I.C. § 19-4906(b), does not violate due process. McDermott has failed to establish otherwise.

D. McDermott Has Failed To Establish He Raised A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On His Newly Discovered Evidence Claim Or Any Other Claim Raised In His Petition

McDermott contends he was entitled to an evidentiary hearing on his newly discovered evidence claim, arguing he "satisfied" the four-part test[2] for such a claim. (Appellant's Brief, p.14.) McDermott, however, fails to articulate how he satisfied that test or why the district court erred in dismissing this claim. This Court should, therefore, decline to consider this issue on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.") see also Idaho Dept. of Health and Welfare v. Doe, 150 Idaho 103, 113, 244 P.3d 247, 257 (Ct. App. 2010) (citations omitted) ("A general attack on the findings and conclusions of a trial court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error.").

Even if the Court considers McDermott's claim that he was entitled to an evidentiary hearing on his newly discovered evidence claim, McDermott has

[2] A petitioner seeking relief based on newly discovered evidence must demonstrate four things: (1) the evidence is newly discovered and was unknown at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) the evidence will probably produce an acquittal; and (4) the failure to learn of the evidence was due in no part to lack of diligence on the part of the defendant. Whiteley v. State, 131 Idaho 323, 326, 955 P.2d 1102, 1105 (1998).

failed to establish error. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

In its order of conditional dismissal notifying McDermott of its intent to dismiss his petition, the district court articulates the applicable legal standards and sets forth, in detail, the reasons McDermott failed to establish a genuine

issue of material fact on his newly discovered evidence claims. (R., pp.352-353, 360-365.) Specifically, the court found, with respect to McDermott's various claims of newly discovered evidence, that the evidence was not new. (R., pp.360, 362-365.) McDermott has failed to establish this district court's conclusions in this regard were erroneous.

Although it is not entirely clear from his brief, to the extent McDermott is challenging the summary dismissal of any of his other claims, the state asserts this Court should decline to consider any such assertion given McDermott's failure to provide any supporting argument or authority or explain why the district court erred. Zichko, supra; Doe, supra. To the extent this Court reviews the summary dismissal of McDermott's remaining claims, the state adopts the district court's written opinion as its argument on appeal, a copy of which is attached hereto as Appendix A.

Because McDermott has failed to establish summary dismissal violated his right to due process or was otherwise inappropriate, he has failed to establish he is entitled to any relief.

CONCLUSION

The state respectfully requests this Court affirm the district court's order summarily dismissing McDermott's petition for post-conviction relief.

DATED this 29th day of December, 2011.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JASON RYAN MCDERMOTT, #62020
I.C.I.O.
381 W. HOSPITAL DR.
OROFINO, ID 83544

JESSICA M. LORELLO
Deputy Attorney General

APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JASON RYAN MCDERMOTT **Petitioner,** **vs.** **STATE OF IDAHO,** **Respondent.**	**Case No. CV-PC-2010-09114** **NOTICE OF INTENT TO DISMISS POST CONVICTION RELIEF PETITION AND DENIAL OF MCDERMOTT'S PRO SE REQUEST FOR DISCOVERY**

BACKGROUND

Petitioner Jason Ryan McDermott was found guilty by jury of first-degree murder and conspiracy to commit first-degree murder, with sentence enhancement for use of a firearm in the commission of the murder of Zachariah Street in May 2003. The State filed notice of intent to seek the death penalty but during the guilt phase the jury was unable to reach a unanimous decision on the statutory aggravating circumstances that would have triggered the death penalty. At sentencing hearing before the court, McDermott was sentenced to concurrent fixed life sentences for first-degree murder and conspiracy to commit first degree murder with a consecutive ten-year fixed term as a sentence enhancement for the use of a firearm.

McDermott subsequently filed a Rule 35 motion for reduction of sentence which was denied on September 12, 2005. He filed a direct appeal of his sentence. His sentence was affirmed in *State v. McDermott* (Idaho Ct.App)(July, 2009)(unpublished)

McDermott subsequently filed this pro se Petition For Post Conviction Relief on May 5, 2010. Counsel was subsequently appointed to represent him upon his request.

II. STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act, I.C. §§ 19-4901 through 19-4911 allows for individuals convicted and/or sentenced of a crime to petition the Court for relief. The statute allows relief in the following situations: the sentence is in violation of the constitution; the court lacks jurisdiction; the sentence exceeds the maximum provided by law; there is evidence, not previously presented, requiring vacation of the sentence in the interest of justice; that the sentence has expired; the petitioner is innocent; the sentence is subject to collateral attack; After reviewing an application for post-conviction relief, the Court can, if satisfied that the applicant is not entitled to relief and that no purpose would be served by any further proceedings, indicate to the parties its intention to dismiss the application and its reasons for doing so. I.C. § 19-4906(b). The applicant shall have an opportunity to respond to the Court's notice of intent to dismiss within twenty (20) days of the proposed dismissal. Summary disposition under I.C. § 19-4906 is the "procedural equivalent of a summary judgment motion under I.R.C.P. 56." *Pratt v. State*, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000); *See also Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941, 943 (Ct. App. 1994). In "determining whether a motion for summary disposition is properly granted, the Court reviews the facts in a light most favorable to the petitioner and determines whether the facts would entitle petitioner to relief if accepted as true." *Pratt*, 134 Idaho at 583, 6 P.3d at 833.

Summary dismissal of a petition for post-conviction relief is appropriate if "the petitioner has not presented evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." *Id.* The Court has stated that an application for post-conviction relief requires more than a short and plain statement of the claim but rather requires verification "with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application." *Goodwin v. State*, 138 Idaho 269, 61 P.3d 626, 628-29 (Ct. App. 2002). If the application fails to include such evidence supporting its allegations, the application will be subject to dismissal. *Id.*

at 629. A court is not required to accept the applicant's "mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law" in deciding whether to grant a motion to dismiss. *Id.* (citing *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986)).

The Uniform Post-Conviction Procedure Act is not a substitute for an appeal from the sentence or conviction. "Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier". I.C. § 19-4901(b)

The elements of a claim of ineffective assistance of counsel are (1) that petitioner's trial counsel was deficient, and (2) that such deficiency prejudiced petitioner's case. *Goodwin*, 61 P.3d at 629; *Pratt*, 134 Idaho at 583, 6 P.3d at 833. To prove petitioner's counsel was deficient, petitioner has the burden of proving that his attorney's representation fell below an objective standard of reasonableness. *Goodwin*, 61 P.3d at 629 (citing *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). Proving such deficiency prejudiced petitioner's case requires a showing of a "reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." *Goodwin*, 61 P.3d at 629. To survive a motion for summary dismissal as to the petition, petitioner must show that material facts exist as to each of the above elements. *Pratt*, 134 Idaho at 583, 6 P.3d at 833.

III
ANALYSIS

Mr. McDermott filed numerous grounds for relief. The court will consider his grounds in the order presented by McDermott and the affidavit of facts in support of his grounds. The first 52 grounds presented are general in nature. Thereafter he presents 36 grounds claiming ineffective assistance of counsel. The court gives notice of its intent to dismiss all grounds.

It appears in reviewing the petition that McDermott begins with ground (b), page 2 of his petition.

b. "Failure to comply to the rules of the 4th Amendment; 'particularly describing . . things to be seized'" McDermott did not provide the court with a copy of the search warrant and there does not appear to be a copy in his trial record. McDermott has the burden of proof on his claims. There is no evidence of alleged error on this issue.

c. "Failure to comply to 6th Amendment rights; to have compulsory process for obtaining witnesses." The court has no idea why McDermott believes he did not have the right to subpoena witnesses on his behalf and if so, how the court prevented him from issuing subpoenas. There is no evidence of error on this issue that would change the outcome of this case.

d. "Failure to comply to the rules of the 5th Amendment; '. . . nor shall be compelled to be witness against himself, nor be deprived of life, liberty, or property.' " McDermott states that the State failed to comply with the 5th Amendment by bringing a man who had committed a brutal offense against him to the section of the jail where he resided, thus putting him in jeopardy. This man was Shane Wendland who in 2001 shot McDermott. Mr. Wendland was subpoenaed by the state to testify in the guilt phase, but the state never called him. There is no evidence McDermott and Wendland had contact at the jail or of any incidents arising out of Wendland's presence in the jail that would impact McDermott's trial.

McDermott has presented no facts on this issue that would entitle him to relief.

e. "Failure to comply to the rules of the 8th Amendment". McDermott states that his 8th Amendment rights were violated because he was not allowed to post bail at his initial arraignment. McDermott does not show how this denial would have changed the outcome of his case.

f. "Failure to comply to the rules of the 14th Amendment, Section 1-'Due Process' " McDermott states that the State failed to give him notice and a fair hearing because of negative statements made by the prosecution to the media which McDermott believes prejudiced his ability to receive a fair trial. McDermott has not provided evidence that any of the jurors selected to serve on his case were influenced by pre trial publicity. The jurors were all separated and questioned individually apart from the other jurors. The jurors filled out extensive pretrial questionnaires that touched upon media reports and what they may have heard or read about his case. McDermott does not point to misconduct by any juror.

g. "During trial, Prosecutor, victim's mother, and Co-defendant Wall's mother held a secret meeting without inviting defendant McDermott's mother". McDermott states that witnesses saw this meeting occur and McDermott's mother was not invited. The prosecutor has the right to talk to potential witnesses without the presence of McDermott's mother. This meeting did not violate McDermott's rights.

h. "Brain injury was a leading factor in my life and should've been allowed in guilt phase". Evidence of McDermott's brain injury suffered as a result of him being shot by Wendland was allowed in the guilt phase. Dr. Froming testified to the impact of this injury.

i. "At Preliminary hearing, witnesses heard a conversation between Angela Turnboo and Robert Key which depicted their intent to falsify testimony." McDermott claims a witness overheard Turnboo tell Key to tell the court what I tell you to say, and Key said I don't want to lie, to which Turnboo said you have to tell them about the keys." McDermott does not identify this witness. McDermott's statements as to what this witness said are not admissible evidence.

j. "State of Idaho made accusations that I was the "master mind" behind this crime. If such were true, I would not have had difficulty in providing care for myself". McDermott claims he could not be the master mind because of his brain damage from being shot. At trial he presented an expert witness who testified to the impact that his brain injury had on him. The jury had the benefit of this testimony. Furthermore the state presented substantial eye witness testimony and facts regarding McDermott's motive to kill and his planning of this murder.

k. "At sentencing, court ignored Jury's wish to not give me the Death Penalty or life without parole." Defendant did not receive the death penalty. The jury could not unanimously agree on the aggravating factors that would require a fixed life sentence or consideration of the death penalty. The court's decision to sentence McDermott to fixed life sentences does not mean the court ignored the jury's wish. The jury could not decide and therefore there was no "wish". If the jury can not unanimously agree on an aggravating factor, the court determines the sentence.

The issue of his sentence was presented on direct appeal.

l. **"During trial, Jury made inquiry of whether or not the crime of Murder 1 could be replaced for Murder II."** This inquiry was made by one juror. This does not change the outcome of this case. The jury heard the evidence and was properly instructed on the law.

m. "Jury Instructions Are Conflicting". McDermott alleges he has three different sets of jury instructions that are conflicting. The only set that matters is the set the court read to the jury. Essentially McDermott claims the instructions did not adequately define murder and the lesser included offenses. If there was an issue with the jury instructions, defendant should have brought that up on his direct appeal. Even so, the court has reviewed the allegations made by McDermott and the instructions given. The court finds no merit to his claim.

n. "In County Jail, I was placed on Psychiatric/Suicide watch pending the judge's order for a competency hearing." McDermott has not provided any evidence to support this claim. McDermott states that he was to be transferred to a facility for a competency examination which never happened and he claims the prosecutor deceived the court by telling the judge it had already been taken care of. The court has reviewed the file and finds no 18-211 evaluation ever having been ordered. Furthermore the court never witnessed anything about McDermott that would lead the court to believe that McDermott was not competent to stand trial. He appeared to work well with his counsel. If McDermott did become suicidal in the jail, the jail would properly place him on suicide watch by placing him in a psychiatric unit.

o. "The PSI investigator inquired whether I had any gang affiliation. I denied the claim, but investigator used a statement by a tainted source, anyway, at my sentencing hearing". McDermott specifically appealed his sentencing. This is an issue that he should have raised on his direct appeal. The PSI, page 8, states that McDermott stated he started a gang called Black Sheep, but later changed the name to Black Dragon. McDermott had the opportunity to speak at his sentencing and address this issue had he chose to do so. During the court hearing on corrections to the PSI, McDermott's counsel requested the name of a gang (Boise Bitch Killers) was in error and that this gang was only known as BDK. McDermott had ample opportunity to bring to the court's attention any corrections he deemed relevant.

p. "Any information provided to the PSI investigator is supposed to be verified before any action is taken". McDermott believes the victim's sister, Ariah Street made conflicting comments. He alleges she made hearsay statements that she forgave McDermott, she

blamed her drug addiction on McDermott, she spoke of gang affiliation, and gun running. He states the PSI investigator should have verified this information before placing it in the PSI report. Hearsay evidence can be considered for sentencing purposes in a PSI so long as the defendant is afforded an opportunity to present favorable evidence and or to explain or rebut adverse evidence. *State v. Mason*, 107 Idaho 706, 692 P.2s 350 (1984). At sentencing McDermott was provided with an opportunity to present evidence and to make a statement and or provide information on his behalf.

This is an issue that McDermott should have raised on direct appeal.

q. "According to Danny Hosford's testimony, 'McDermott fired the first shot and Wall fired the second shot'; State experts testified that first shot would not have caused immediate death." McDermott argues that it was the second shot to the head that killed Street and because his first shot to the head did not cause immediate death, he should have been treated more leniently. The expert testimony was that either shot would have resulted in death to Street. The court finds no merit to his claim.

r. "The Jury's decision to not give me the Death Penalty should not have affected co-defendant Wall's trial/sentencing proceedings." Following the jury's inability to decide aggravating factors for the imposition of the death penalty, the prosecutor decided not to seek the death penalty against co defendant Robroy Wall.[1] Whether or not to seek the death penalty is within the discretion of the prosecutor.

Basically McDermott complains that Wall received a more lenient sentence than McDermott. He claims this is unfair because he claims the prosecutor argued at Wall's sentencing that McDermott would not have committed the murder without Wall. The evidence indicated McDermott solicitated Wall to assist him in the killing of Street. The court heard both McDermott and Wall's separate trials. The evidence in both was basically the same. The court believes it is likely the murder would not have occurred had McDermott not had help. McDermott was more culpable and deserved a more serious sentence that Wall.

s. "When one defendant is found guilty of Conspiracy, the other co-conspirator should as well, according to the laws of Idaho". McDermott apparently believes it is unfair that while he was found guilty of conspiracy to commit first-degree murder, his co-defendant

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[1] *State v. Wall, Jr.* Ada County Case No.. H0300621

Wall was not. The evidence presented at McDermott's trial was stronger on the conspiracy charge than in Wall's separate trial. Hosford, the third defendant involved in the murder testified at both McDermott and Wall's trials Hosford had greater personal knowledge of McDermott's involvement and planning than he did of Wall. The jury decided the conspiracy charged against [2]Wall had not been proven beyond a reasonable doubt. This outcome does not alter the outcome in McDermott's case. McDermott had a fair trial. The jury heard all the evidence and rendered a verdict.

t. "Court showed obvious bias when she ordered gun enhancement to be consecutive to other charges". McDermott states the court showed bias by adding the gun enhancement as a consecutive sentence and not as a concurrent sentence which was done in the Wall sentencing. Wall was sentenced to a life sentence with twenty five years fixed. The court imposed five years fixed for the use of a firearm during the commission of a crime, to run concurrent to the life sentence. [3] Based on the entire record involving Wall, the court believed twenty five years fixed to be a sufficient fixed penalty for Wall. The court is convinced that Wall would not have been involved in this crime had it not been for McDermott's solicitation of Wall and Wall's friendship with McDermott. Wall also did not have the same history that McDermott had. The court is convinced that McDermott will murder again if given the opportunity to do so.

u. "Court showed obvious bias and prejudice by allowing herself to be swayed by the misinterpretation of a song I had written". McDermott alleges that the court showed bias when she allowed herself to misinterpret a song he had written out of anger; toward the individual who had shot him, and used it as a justification to giving him such a harsh sentence. At McDermott's sentencing the court considered all the evidence presented at trial, including the death penalty phase, all information in the presentence reports, all statements and arguments made at sentencing. The court had substantial information regarding McDermott. The song written by McDermott was a small piece of the big picture. If defendant believed the song unfairly influenced the sentence, he could have asserted this issue on direct appeal.

v. "Evidence shows lack of obtainable information pertaining to my conversation with police detectives":. McDermott appears to allege that statements he gave to police can not

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[2] Wall appealed his conviction which was affirmed. *State v. Rob Roy Jr.* (Idaho Ct. App.)(April, 1, 2010)(unpublished)

be verified and should not have been allowed as evidence in any proceeding. Statements he made to police during his interview following his arrest were suppressed by this court following a suppression hearing. McDermott alleges that these statements were used against him at the preliminary hearing. Evidence at the preliminary hearing that is ultimately determined to be inadmissible, is not ground for vacation of a conviction. *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983).

w. 'The court erred in dismissing my claim of competency, as is stated under rule 18-210". This is an issue known to McDermott and should have been brought on direct appeal.

x. "Court ignored fact that I was having difficulty understanding proceedings." The court is unaware of any happening that would lead the court to believe McDermott did not understand the proceedings. The court frequently observed his demeanor during trial and at all hearings. McDermott at all times appeared very attentive to the proceedings and to converse freely with his attorneys.

y. "Court showed prejudice when, at sentencing, I requested proper placement at a facility which could better handle my mental condition, and my request was denied." This issue was known to McDermott and should have been brought up on direct appeal. McDermott also has not pointed to any custodial placement where he would be housed for life that would be an alternative to the Idaho State Board of Corrections. At sentencing the court advised McDermott that it was up to the Department of Corrections to make the decision on his placement.

z. "Court did not take my mental defects into consideration at sentencing, failing to comply with rule 19-2523(1)(a-f)." This is an issue known to McDermott which he should have raised on direct appeal.

Even so, the evidence presented indicates McDermott suffered a traumatic brain injury in 2001. The presentence materials as well as the evidence presented during trial, provided the court with substantial information regarding his brain injury. The defendant was not mentally ill as a result of this injury. McDermott claimed his brain injury to be a mitigating factor in his murder of Zachariah Street. However, his behavior was evil before he murdered Street. The

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[3] *State v. Wall, Jr.* Ada County Case No.. H0300621

court considered his behavior before his brain injury and after his brain injury, and his predisposition to commit murder remained unchanged.

1. "Court ignored Danny Hosford's many falsified, re-attempts of his statement to police, and still allowed his testimony at trial; showing prejudice and bias." Hosford was a witness at McDermott's trial. McDermott was given the opportunity to cross examine Hosford and to point out his inconsistent statements to the jury. The jury determines the credibility and weight to give the witnesses' testimony. McDermott has not pointed to anywhere in the trial record where the court showed prejudice or bias. The court heard Hosford's testimony at the same time as the jury.

2. "Prosecution abused its discretion by misleading the jury in opening statements." McDermott claims the prosecutor in opening statements misled the jury by stating that the victim, Zach Street, had told the police who was involved in the burglaries, which would subsequently lead to his death. This is an issue known to McDermott that he should have brought up on direct appeal. Furthermore, the opening statements are not evidence. The jury is instructed to consider only the evidence admitted in reaching a verdict.

3. "Prosecution abused its discretion by attacking my Allocution in closing arguments." This is an issue known to McDermott that he should have brought up on direct appeal. Furthermore, this was a sentencing hearing. Statements made in the PSI can be argued by either side.

4.. "Detectives coerced Danny Hosford into making other, false statements about the events of, and leading up to, May 1st 2003". At trial, McDermott was provided with a full and fair opportunity to cross examine Hosford and the detectives as to any false statements and coercion. All of these statements were available to McDermott prior to trial. McDermott has not pointed to any statements or new evidence that was not available prior to trial.

5. "Judge abused her scope of knowledge by saying that I will most likely re-offend if I were given a chance at parole". McDermott appealed his sentence on direct appeal. This is an issue he could have raised on appeal. Furthermore, all the information before the court indicates McDermott will reoffend.

6. Judge showed a hinted bias by her proclamation, about allowing a doctor to testify in the Guilt phase, concerning post-conviction relief issues." During the trial the state

objected to defense calling witness Dr. Karen Froming for the reason she had not been disclosed in discovery and it was fundamentally unfair to the state. The state said: "I don't know how to beat this when I learned about it for the first time this morning." Trial Transcript, p. 1254. The court was placed in a difficult position. On the one hand defendant's right to receive a fair trial and on the other hand the state's right to be fairly treated and be given an opportunity to cross examine and rebut defense evidence. The court allowed the State to cross examine Dr. Froming outside the presence of the jury and ultimately the court decided in favor of defendant because to not allow her to testify would likely lead to post conviction relief issues. The court fails to see how this shows a bias against the defendant. The court's decision was against the state on this issue.

McDermott further alleges that the court was biased by not allowing any reference to the "PET scan conducted on McDermott by Dr. Froming. The court determined that Dr. Froming testifying to a PET scan was fundamentally unfair to the State, and that information sought by defense from Dr. Froming could be obtained without reference to a PET Scan.

McDermott also alleges the court absolutely refused to allow any mention of his traumatic brain injury into the Guilt phase, which is an obvious projection of bias and prejudice. McDermott does not point to the record where the court made this ruling. In fact Dr. Froming testified regarding his brain injury and the effect that would have on his vision at the time of the murder.

7. "The court erred in its decision to allow Mr. McGowan to State his opinion about my capability of 'putting a gun to the victim's head and pulling the trigger'". The court reviewed the transcript and its ruling. The court continues to believe the correct ruling was made. This is an issue McDermott could have raised on direct appeal.

8. "There was a three month wait before I was sentenced, allowing the Court to hear co-defendant Wall's trial proceedings". McDermott appears to allege that the court is prejudiced against him because the court delayed his sentencing because it and the State wanted to hear the results of co defendant Wall's jury trial. There is nothing in the record to support this contention. McDermott's trial concluded on March 6, 2005. Codefendant Wall's trial started on April 4, 2005 and concluded on April 20, 2005. McDermott's presentence report is extremely lengthy, about seven inches thick. He was found guilty of First Degree Murder. It would have

been difficult, if not impossible, to have concluded McDermott's pre sentence investigation so that the court could go to sentencing prior to April 20, 2010. McDermott was sentenced based on the evidence presented at his trial, the pre sentence report and the arguments and statements presented at sentencing..

9. "During Sentencing hearing, the Jury asked if they had to give a life sentence without parole, or the Death Penalty, of if they were allowed to give a lesser sentence". One juror asked this question. McDermott appears to allege that the court showed bias against him by instructing the jury "that the final instructions that the court gives at the conclusion of the evidence of the penalty phase will answer that question. Should you have additional questions during jury deliberation, then you can give those questions to the bailiff, who will provide those to the court". Trial Transcript, p. 2000. The court showed no bias and answered the question in a neutral manner.

10. "At Sentencing, Judge stated that she believed the jury would have been right in giving me the Death penalty". McDermott appears to allege that the court was biased against him at sentencing. McDermott appealed his sentence in which he raised this issue. He can not now raise it again in this petition. The court formed an opinion regarding this crime and McDermott based on the trial, the presentence investigation and statements and arguments made at sentencing. The Court of Appeals pointed out in its decision that the court does not abuse its discretion at sentencing by abandoning its role as a neutral and detached judge. *State v. McDermott*, ICAR, 2009 Unpublished Opinion 518, p. 4.

11. "For the State to use my Criminal history during Guilt/Penalty phases shows undue prejudice, and goes against the rules set forth by Rule(s) 403 and 404, of the Idaho Rules of Evidence." This issue could have been raised on direct appeal and is therefore forfeited. The court followed the rules of evidence. There is no undue prejudice here.

12. "Witness Cory McCuiston made two (2) conflicting statements to police, concerning suspect's identity". McDermott alleges that Cory McCuiston first told the police that McDermott left with someone in a purple sports car and that he did not know the name of the driver and thereafter contradicted himself by saying McDermott was the driver. McDermott was aware of this evidence at the time of trial and was given the opportunity to cross examine

Cory McCuiston on this inconsistency. This is not new evidence and furthermore, even if true, it would not change the outcome in this case.

13. "Witness Robert Key made two (2) conflicting statements to police, concerning the stolen gun". McDermott alleges that Robert Key told police that McDermott did not steal a gun and later told police that McDermott stole a gun. This is not new evidence. It was available to McDermott at the time of trial. The trial transcript indicates Key stole the gun because McDermott wanted a gun.

14."Witness Renton McGowan made several conflicting statements to police, concerning his roles of the leadings up to the death of Zachariah Street." Renton McGowan was subject to cross examination at trial. The alleged inconsistent statements alleged by McDermott would make no difference in the outcome of this case.

15. "State's witness, Renton McGowen, gave false testimony at trial." McDermott states McGowan during trial testified that when he entered McDermott's apartment McDermott asked him if he had given names to the police, but in his interview with police he said after being released from jail that he immediately told McDermott he did not give names. McDermott also states that in McGowen's first interview with police, he stated he did not know how McDermott got McGowen's reports that he saw sitting on McDermott's counter. McDermott states at trial McGowen stated that he had given the papers to me. The court fails to see how any of this would be new evidence, or would have any affect on the outcome of the trial.

16. "Witness Angela Turnboo denies rumor of threats I supposedly made against the victim". McDermott alleges that in Turnboo's interview with police she states she has "never heard McDermott threaten Zach" and she testified at trial that McDermott and Street were good friends. The court fails to see how this would be new evidence, or would have any affect on the outcome of the trial.

17. "At co-defendant Wall's sentencing hearing, State makes two (2) contradictive statements, as arguments in my favor; thus, rendering his case against me as false." McDermott notes that the state at Wall's sentencing stated: "One other thing, it should be apparent that McDermott could not have done this by himself . . . And yet, in the week or so before he was killed, McDermott can't do this. He can certainly get a gun without Mr. Wall. He did that on the night he returned from Pullman . . but it doesn't get done . . . McDermott cannot

or will not do this without Wall". McDermott seems to think that this statement by the prosecutor makes the case against McDermott a false one. However, the case against McDermott was that he solicited the help of Wall to commit this murder. This court believes that McDermott would not commit the murder without help. However, the idea and motive for the killing all came from McDermott. He was able to commit the murder with the help of Wall and Hosford. The state's position at the Wall sentencing does not help McDermott and it is not inconsistent with the state's theory of the murder.

McDermott also alleges that at Wall's sentencing the state said: "There's a period of time after Renton McGowan gets out jail where Jason McDermott is shooting his mouth off around the community, telling people that Zach had to die because he was a snitch, and he was going to put a bullet in his head. And throughout all that time, Zach, from the evidence was either unaware or unconcerned about these statements by McDermott. He continues to socialize with McDermott". McDermott argues that if Zach was not afraid of McDermott then this would suggest that he knew McDermott would not harm him. This argument does not help McDermott. The evidence the jury heard indicated that Zach continued to socialize with McDermott right up to the very end. It was not until just moments before Zach was shot in the head by McDermott that Zach realized McDermott would harm him. The jury had the opportunity to evaluate all the evidence.

18. "Prosecutor and judge described me as being "heinous" and "evil" during the trial/sentencing proceedings. The court stated my crime as being "out of the normal range" of what she considered "regular Murder". The execution style slaying of Zach was in fact evil and heinous. . The court explained its reasoning at sentencing. The sentencing was an issue on direct appeal.

19. "Conspiracy charge is in excess of sentencing guidelines, under rule 19-2520(B), Idaho Code". Idaho Code Section 19-2510B provides for a sentence enhancement by an additional twenty years against a "person who inflicts great bodily injury". This statute does not apply to McDermott because the state did not charge a sentence enhancement. The state charged first-degree murder and conspiracy to commit first degree murder. Both murders already included in their commission the element of the intent to inflict great bodily injury. The

legislature did not intend for the elements constituting a crime to be used a second time to impose a harsher sentence on a defendant. *State v. Elison*, 135 Idaho 546, 21 P.3d 483 (2001).

20. Prosecution misquoted a statement I made concerning the death of the victim; thus misleading the jury." McDermott alleges that state mislead the jury by telling them that the only thing McDermott could bring himself to say about the murder is, "It's a shame that Zach is dead." McDermott states the actual quote of what he said was: "Zach did not deserve to die", thus misleading the jury. The jury heard all the evidence presented at trial. The prosecutor's statements are not evidence. Furthermore, the meaning of both statements is not inconsistent. The prosecutor's statement implies the same sentiment that Zach did not deserve to die.

21. "At the Sentencing hearing, my PSI report was misused by the prosecution, when they stated only certain parts of the PSI report." The court read the PSI report. The court had the same information before it at sentencing that McDermott and the state had. At sentencing counsel on both sides are free to argue what they want from the report. The prosecution did not mislead the court. McDermott had an opportunity to speak at his sentencing and he could have talked about this issue at that time had he thought it significant. It is not an issue that would change the outcome of the sentence. This is also an issue that McDermott could have pursued on his direct appeal.

22. "Change of Venue was denied". This is an issue that was available to McDermott on direct appeal. The court spent many days in questioning potential jurors. There is no evidence that any juror selected did not provide McDermott with a fair and impartial trial.

23. "There exists evidence of extrajudicial, prosecutorial, and jury misconduct which directly affected the outcome of my trial." McDermott had this issue available to him on appeal. He has not presented new evidence. He has selected statements out of context that he believes supports his issue. The entire trial indicates McDermott's conviction was based on substantial evidence, including both eye witness testimony, forensic evidence and circumstantial evidence. In regards to extra judicial statements he has not provided admissible evidence. A reading of the transcript indicates McDermott was treated fairly by the court and he had a fair and impartial jury. Furthermore there is no evidence of prosecutorial or juror misconduct.

24. "PSI is not allowed to be done at Guilt phase because it shows existence of prejudism (*sic*), by suggesting that the State/Court already knew the defendant would be

found guilty of the crime." No PSI was done during McDermott's guilt phase of his trial. The guilt phase first determines if the defendant is guilty or not. If found guilty a PSI would then be ordered if the death penalty had not been requested. The court is required to proceed promptly to the sentencing phase of a death penalty case if the jury finds the defendant guilty of First Degree Murder, with the same jury that found defendant guilty. Idaho Code Section 19-2515. No PSI is required during the sentencing phase of a death penalty case. The jury is presented with evidence at that stage that supports or does not support the finding of aggravating factors warranting the imposition of the death penalty. The jury makes its decision based on that evidence, not on the basis of a pre sentence investigation. McDermott's jury could not make a unanimous finding as to an aggravating factor. Therefore, the death penalty could not be imposed. The court then ordered a PSI to aid counsel and the court in determining an appropriate sentence.

25. "PSI information was unlawfully obtained and used in accordance to rule 19-2515(4)". McDermott states there was no order for a PSI, "nor, were any statutory aggravating circumstances proved by the jury. So the existence of the PSI is in disregard of 19-2515(4). And U.S. District court rule 32.1(b)(1) was disregarded, when the PSI was obtained before a conviction was even found." This is a ridiculous statement. There is absolutely no evidence a PSI was ordered before McDermott was found guilty of First Degree Murder and Conspiracy. 19-2515(4) I.C. 19-2515(4) states "no presentence investigation shall be conducted" referring to the sentencing phase of a death penalty case. If no statutory aggravating circumstance is proven, the court may order a presentence investigation. Here, no statutory aggravating factor was found and the court then ordered a PSI.

26. "State's witness Robert Key falsified information on the stand McDermott states that Key testified falsely that the gun was put in a Mitsubishi Eclipse that belonged to Mr. Wall when in fact the vehicle belonged to Ms. Turnboo and not Wall. He further states Key could not have witnessed McDermott place the gun in a blue lock box in the trunk of the Eclipse. McDermott provides no admissible evidence to support this.

THE FOLLOWING ARE MCDERMOTT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A. At trial, counsel would not allow me to take the stand in my defense. They said, despite my argument that it would only make it worse. I believe, had I been allowed to take the stand, the outcome of my trial would've been different. The counsel's exact words were, 'If you testify, the State will tear you apart'. Apparently, they told my family the same thing. The only reason I told the Court that It was my decision not to testify,; albeit, reluctantly,; was because at that time, I was susceptible to just about anything that my attorneys told me; along with other people's ideas; because I was recently out of hospice and still in healing from a traumatic brain injury, and my attorneys took advantage of that. They made me believe that I would be in worse position if I took the stand. (Being what I know now, that was a misrepresentation and abuse of discretion, and misconduct.)" The court inquired of the defendant during the trial if he wanted to testify. **Transcript pp. 158, 1359, 1360, 1361.** Defendant indicated he had ample time to discuss this issue with his attorney. He said he had plenty of time to think and talk to his attorney about this issue. He stated he did not want to testify and it was his election not to testify. He believes the outcome of the case would have been different had he testified. However, he does not provide evidence of what testimony he would have given that would make a difference in this case. Had he testified in this case, the state could have impeached him on his statement to law enforcement that his attorneys successfully had suppressed. His statements to police implicate him in the murder. He admits to police that he fired a shot into the victim. The forensic evidence showed that the victim received two shots, both to the head. One was fired by co-defendant Wall.

B. "Counsel repeatedly took advantage of me having a brain injury by not telling me necessary information, or allowing me to view necessary photographs and documents; knowing that I probably would be incapable of knowing the difference". McDermott provides no evidence of what he alleges counsel withheld from him, and if so, how that information would change the outcome of this case.

C. "Counsel failed in their capacity as my defense counsel by refusing to listen to me when I told them I did not understand what was going on at trial." McDermott has provided

no evidence to support this claim and as to what he did not understand and if so, how that would change the outcome of this case.

D. "When I told my counsel that I did not understand, or follow, the trial proceedings, and asked what was going on, my counsel told me, 'Oh, it's just a bunch of legal mumbo-jumbo. Don't worry about it.'" McDermott has provided not evidence of what he did not understand and if so, how that would change the outcome of this case.

E. "After Sentencing, I put in for a re trial. At the hearing, Mr. Odessey tried to deter me by saying that the Prosecutor would retry me for kidnapping and torture murder. When I disputed this by saying they couldn't because it was already determined that it wasn't kidnapping or torture, my counsel then said, 'You don't want to put Zach's family through that again, do you? Or your family?' I said, 'No; but my family would rather I fight for my life than to just give up.' Mr. Odessey then stated, 'Oh. Well, then, the State will go for the throat and this time you <u>will</u> get the Death Penalty.' That scared me, so I conceded; reluctantly. Only because I thought he was telling me I had no choice." McDermott has provided no legal basis to believe he would be entitled to a new trial. His attorneys won a major battle in convincing at least one juror not to find an aggravating circumstance that could have resulted in the imposition of the death penalty.

F. "During trial, when I asked to see my entire Discovery and PSI Report, counsel stonewalled until it became clear to them that I wasn't going away. When I did finally get it, Mr. Palmer – the private investigator – rushed me by saying he was on a tight schedule. He told me I only had 1 hour. After that hour, I requested to be able to see it another day, but was not given another chance. I was unable to fully review, understand, and discount any falsehoods." McDermott fails to show how the outcome of the trial would have been different.

G. "Counsel told me that, 'It's no big deal. Don't worry about it.', when I told them that the PSI investigator had said that Ariah Street informed her that I belonged to a gang called 'BBK'. I disputed that, by telling the PSI that I was unaware of its meaning. My attorneys ignored me. They said it was unimportant. But that statement and claim was later used against me at Sentencing hearing." Neither attorney argued this at the sentencing hearing. McDermott was given the opportunity at sentencing to personally address the court and

to tell the court whatever he wanted to say. If he believed this fact was important he had the opportunity to tell the court that. Furthermore, prior to the sentencing hearing the court held a hearing to discuss any corrections to the PSI. At that hearing, defense counsel explained that defendant had no knowledge of a BBK gang, but he knew of a BDK gang that was only referred to as "BDK". The court corrected the PSI to reflect this correction.

H. "When I stated that I didn't understand what the Prosecutor and Judge were saying, Mr. Odessey said, 'You're lying. You seem to understand what we're saying'. When I said, 'Not really.' Mr. Odessey told me to stop lying." McDermott has provided no facts to support this claim as to what he was not understanding and how that would make any difference in the outcome of this case.

I. "When my attorneys said I was competent enough to figure things out for myself, I asked if he'd ever been shot in the head. He said, 'No. But that has nothing to do with anything.' I said, 'Well, yes it does. I'm still healing. And when I said I don't understand, I'm not lying or trying to get attention. I don't like having a brain injury, but I have to deal with it because it affects my every-day living. All I'm asking of you is to consider that I'm telling the truth and help me with what I need.' Mr. Odessey said I was making it all up. In that, counsel failed in their capacity as my representatives." McDermott has failed to show how any of this would make any difference in the outcome of his trial.

J. "Counsel purposely misled me, with the intention of causing me emotional distress, when in a meeting, they told me that the Prosecutor might come to me with an offer. The alleged offer was that if I testified against my co-defendant, (Robroy Wall), that the Death Penalty will be left off the table. Two months later, I was informed that that deal laws never going to be presented. When they came to me, they talked with me for about 15 minutes, with every attempt to get me to testify. I told them several times, that if I did that, (Wall) would have me killed. They told me that there were several individuals who had testified in court, who live a good life while in prison. I kept telling them I wasn't everyone else and that (Wall)would have me killed. This happened around the same time that my co-counsel (L. Smith) was going for the defense of Manslaughter (Negligent Use of a Firearm), instead of Murder. (Refer to Opening Statement of Defense). The jury did not impose the death penalty. There is no evidence that the State in fact made any offers to

McDermott. Defense counsel can certainly tell their client what could possibly happen in his case, such as the prosecutor might make an offer. McDermott has made no showing of how any of this would change the outcome of his case.

K. "Counsel failed to make notice of the fact that Judge sentenced me to Life w/o Parole; but then gave me a consecutive sentence of 10 years for a gun enhancement; meaning that the Natural Life sentence would not have a set number of years. The sentence would be excessive, and illogical, because, if my sentence is to die in prison, then how would I serve the added 10 years". McDermott appealed his sentence. This sentence was reviewed by the appellate court and affirmed. The court imposed the sentence which was within the law. His attorneys argued for a more lenient sentence. McDermott has failed to show how his attorneys were deficient and how the outcome of his sentencing would have changed or how he is prejudiced. As McDermott points out, a life sentence means he will be in prison until his death. The additional ten years fixed should not affect him.

L. "Counsel failed to inform me of their intent to file a "motion to Exclude Evidence of Defendants Mental State in Guilt Phase." They did not consult with me at all, and thus failed in their capacity of representatives. They held a meeting with the court about this exclusion, without my presence. (See Addendum L. Under this section) Should counsel and court allowed such evidence, I believe it would have directly affected the outcome of my trial; where acquittal would be a high probability." The court has reviewed Addendum L and the transcript. McDermott's attorney was simply advising the court and the State of a discovery witness he intended to call in the penalty phase so that the State would have notice. His attorney never presented a "motion to Exclude Evidence of Defendants Mental State in Guilt Phase". Furthermore, evidence of McDermott's brain injury was presented during the guilt phase by a variety of witnesses, including his expert witness Dr. Froming. The state presented a substantial case against McDermott through physical evidence, eye witness reports, circumstantial evidence, and witnesses who testified to McDermott's relationship with Hosford, and to seeing co-defendants McDermott , Wall and Hosford together. McDermott has failed to show how the outcome of this case would have been different.

M. "Counsel failed in their capacity as my attorneys by ignoring the existence of provided character witnesses for my behalf. Several known friends and family and

acquaintances had volunteered statements, which in its magnitude, would have directly affected the outcome of my trial. [Exhibit Note; See Addendum I 1 of Affidavit In Support of Post Conviction Petition]" Idaho Rules of Evidence Rule 404(a)(1) allows evidence of a pertinent trait of the accused's character offered by the accused. McDermott has not shown what pertinent trait of character would be relevant in this case. Had McDermott put on evidence that he was a peaceful person, the state had substantial evidence to refute that which if offered during the guilt phase would have substantially harmed his defense. For example, the state during the penalty phase put on evidence of McDermott's character for committing acts of violence, such as lacing a soft drink with iodine because he wanted to kill another person, making a threat to kill an Oregon police officer, and intending to kill the person who shot him in the head before that person shot him. McDermott has failed to show how the presentation of character evidence would have changed the outcome of his case.

N. "When I informed my counsel that I was unable to follow and understand the speed of the witnesses and the testimony of each witness given, and that someone had told me to request an 18-211, my counsel told me: 'No. That won't do anything. All that is, is to see if you know what roles a Judge, prosecutor, and jury plays and where they sit. You don't need that. You seem competent enough to me'. By saying this, he assumed the role of a qualified expert of that particular field. He is <u>not</u> a licensed psychologist, and therefore, was outside his capacity and scope of qualified expertise. (See Note 2). McDermott claims he did not understand the differences in the meanings of 18-211, 18-210, and 18-207. However, McDermott has not provided evidence to the court that would indicate he was not fit to proceed with trial or that his brain injury affected his state of mind in regards to the commission of the murder. McDermott had a propensity to commit murder before his brain injury which continued after the brain injury. Had McDermott opened the door in the guilt phase that his brain injury affected his state of mind, the state could have presented substantial evidence to counter that. Furthermore, the court observed McDermott on many occasions before and during the trial. The court witnessed no behavior that would indicate McDermott was not fit to proceed with trial.

O. "I believe my counsel purposely, with malicious intent to cause severe emotional trauma, misled me into believing that the man who shot me in 2001, was going to testify in

my trial. When I was told, by my attorneys, that the man who shot me would be in the court room and would I be okay with that; I stated, with extreme agitation and fear, that I believed the only reason Mr. Wendland agreed to come over from his prison cell in Oredon, was to finish what he started. There is a record that Mr. Wendland was transferred and housed in the same unit (L.C.U.) as myself. Refer to original Discovery – Motion to Obtain Out-of State Witness. (See Note 3)" McDermott believes his counsel acted with malice against him in telling him that Wendland was going to testify. However, what they told McDermott was the truth. Wendland was transported from Oregon and housed in the Ada County jail at the request of the state who intended to call him as a witness. However, the state changed its mind and did not call him. McDermott's counsel was not deficient in advising McDermott regarding Wendland.

P. "Counsel failed in their capacity as my attorneys by failing to make notice that my Traumatic Brain Injury <u>was</u>, indeed affecting my ability to pay attention to the trial proceedings, and thus, disallowing me to be able to assist my attorneys in my defense. An example would be that during Jury Selection, I kept falling asleep. Part of my TBI, is that under high levels of stress, my body shuts down, and that sometimes means I will fall asleep, or lose consciousness, for several minutes." McDermott has not made a showing of how this would change the outcome of his case. The court observed McDermott closely during the pre trial and trial proceedings. Not once, did the court observe McDermott to fall asleep. He always appeared attentive and to converse frequently with his counsel.

Q. "Attorneys failed in their capacity as my representatives by not challenging, more adequately, the testimonies of the witnesses against me. Mr. Key gave false testimony concerning the stolen gun. When questioned by the police he told them I had nothing to do with the theft; but in his testimony he stated that it was my idea to steal it. I told my attorneys this, but they did not question him in their cross-examination. Mr. McCuisition also stated something different in his original interview with police. In his second interview, he changed his story. And on the stand, he changed it, slightly, once again. My attorneys failed to make notice of this. Mr. Hayes and Mr. Peppersach both made falsified statements against me. They both had an ulterior motive. And even though my attorneys attacked the statements made by these two, they could have asked different questions to try

to catch them in their lies. Ms. Turnboo had originally given police information which helped me, but had later retracted her comments, to follow along with what everyone else was saying. At the Preliminary Hearing, several witnesses saw and heard her instructing Mr. Key to lie on the stand, saying 'If you don't tell them I gave him the keys, they'll arrest me for perjury . . .' These witnesses all informed my attorney of what they heard, but my attorney ignored them, and never even challenged Ms. Turnboo on this info. Detective Ken Smith made several conflicting statements about the supposed conversation he had with me. My attorneys should have challenged the veracity of his statements, and made it so that it could not be used against me in any way. (Refer to Point Z). Mr. Hosford made many falsified statements to police. And once in trial, he made a few more false statements. My attorneys only challenged part of his statement. They should have made objections to his inaccurate and unverified statements before and after he took the stand. In this, my attorneys failed in their capacity as my defense counsel.

McDermott provides the court with no admissible evidence regarding Keys statements to police.

McDermott fails to provide admissible evidence regarding Mr. McCuisition giving varying statements with police and what he testified to at trial.

McDermott fails to show what questions of Mr. Hayes and Mr. Peppersach would have changed the outcome of this case. McDermott also presents no evidence to show they were lying.

McDermott fails to provide admissible information as to what Ms. Turnboo had originally given to police and as to witnesses that may have overheard statements she made at the preliminary hearing and what those statements were. Furthermore, even if his allegations are true, he fails to show how this evidence would be material in changing the outcome of this case. The state had substantial evidence against McDermott.

McDermott fails to provide admissible evidence as to what Detective Ken conflicting statements were and how those would have changed the outcome of this case.

McDermott has provided no admissible evidence regarding any false statements made by Hosford and if so he has failed to show how those statements would change the outcome of this case.

R. **"My appellate attorneys failed to inform me that I was allowed to challenge both the conviction and sentence at the same time. I was told that I could only challenge one or the other, and that I had to choose. Immediately upon this knowledge, I let them know I wished to challenge the conviction. I told them this many times. But when the day to actually decide came, they informed me that it was highly unlikely that I would get the conviction overturned, and that it was more likely I'd get my Sentence overturned. So I reluctantly changed my mind. However, near the end of the filing of the request to vacate my Sentence, my attorneys told me 'not to hold my breath', that 'it's highly unlikely' that I'd get my Sentence vacated."** McDermott has failed to show how the outcome would have been different had he appealed his conviction. He has not provided the court with a showing of error that would overturn his conviction.

S. **"Counsel failed to make notice of material facts concerning the lack of adequate, and total, Forensics evidence against me. There was never any testimony, nor exhibits shown in support of, the lack of any footprint castings, DNA/blood, Trace, fingerprints or other tangible evidence found that had any connection to me. However; there was evidence found, and printed findings of such evidence, to support the existence of such evidence against Mr. Hosford and Mr. Wall; my co-defendants. Footprints and castings were taken which matched both Mr. Wall's and Mr. Hosford's footwear; and DNA/blood of the victim was found on Mr. Hosford's shoes, pants, and leather jacket, and on Mr. Wall's gloves, and leather jacket; and, fingerprints from the weapon were found to match both Mr. Wall and Mr. Hosford. Detectives had questioned Mr. Hosford concerning the lack of forensics evidence against me. Which means that it is likely that the Prosecutor was aware of it; and that it is likely that my attorneys were aware of it, or should have been aware of it. In this, my attorneys failed in their capacity as my defense counsel."**

The court does not have a transcript of the closing arguments made at the conclusion of the guilt or penalty phase of the trial. The burden is on McDermott. McDermott also does not point the court to where in the trial transcript is there support for his allegations. McDermott has failed to make a showing that this claim would change the outcome of his case. The state presented substantial evidence against McDermott.

T. **"During trial, counsel failed in their capacity as my defense by not informing me of my right to view the Jury Questionnaire; albeit limited by the Judge's Protective Order – on personal information of the jurors'; and thus, hindering my ability to aide in my own defense. Criminal Procedures Rule 23.1 defines the confidentiality of the jurors, but also makes it apparent that I have a right to view such info.** McDermott fails to show why his knowledge of confidential information regarding a juror would have changed the outcome of his case. If his appointed counsel on this petition deems it necessary to review the Juror Questionnaires pursuant to Idaho Criminal Rules Rule 23.1, he can make that request.

U. **"Attorneys failed to make notice that Mr. Wall, my co-conspirator, was found not guilty of the Conspiracy. This would mean that my Conspiracy charge is in excess of the Sentencing guidelines and the guidelines of 18-1701, Idaho Code. In this, my counsel failed in their capacity as my attorneys."** Wall was tried separately from McDermott with a different jury. The conspiracy involved co-defendant Hosford. Criminal conspiracy only requires two or more persons to conspire to commit a crime. I.C. 18-1701 The fact that the jury chose not to convict Wall, does not vindicate McDermott in the conspiracy. There was substantial evidence that he conspired with Hosford to commit the crime.

V. **"There existed irrefutable proof of evidence, not presented at trial, that would it have been introduced into evidence, would have most likely resulted in my acquittal. And because my counsel failed to notice, or make notice, of such evidence during trial, they neglected their duties as Public Defenders. During trial, during the State's case, Mr. Odessey states, ' I do not have any fact witnesses in Phase 1'. [P.412, Ls 6-7; Trial transcript] With full knowledge and intent to deceive and misrepresent, my counsel prevented me from having a fair and proper trial, and this broke the Professional Rules of conduct under Rules 1:3 (1-3), and, 1:4 (AL1-4), and B;b 1:4(3),(5), (7).** McDermott fails to provide any admissible evidence of what any fact witnesses would say that would change the outcome of this case. Furthermore, defense called Joyce Head and Detective Kenneth Smith as fact witnesses.

W. **"Counsel failed to make notice that co-defendant Daniel Hosford's statement to police was illegally obtained. Mr. Hosford was a minor at the time of his arrest, and detectives spoke to him without the presence and/or consent of his legal guardian.**

Therefore, any statements received by this individual are illegal and inadmissible.: McDermott does not have standing to make this claim. Only Mr. Hosford can do that. In any event, statements made by Hosford to police to prove the truth of the matter asserted were not testified to by the police at McDermott's trial.

X. "Counsel failed to make notice of the Court's inadequate definition of the instruction concerning Involuntary Manslaughter, which subsequently misleads the jury into believing that involuntary manslaughter isn't a likelihood. The instruction speaks only to the 'heat of passion" part of involuntary manslaughter, but does not cover the rest of its meaning." The jury never considered the lesser included offense of manslaughter because the jury found McDermott guilty as charged by the state. Therefore, if there is error in the instruction it is harmless because the jury never considered it. In any event, the court instructed the jury based on the facts and law of the case.

Y. "Counsel neglected their duties by not following up or investigating the discrepancies brought up at Preliminary Hearing concerning the space of time in which I sat, still handcuffed, in the interrogation room. The detectives stated that it was only a minute. However, the time stamp of my interview and the time I was arrested is equal to a gap of approximately 1 ½ hours to 2 hours. (See Point D-Affidavit in Support). The trial court suppressed the statements made by McDermott during interrogation. The court fails to see how this allegation would change the outcome of his case.

Z. "In support of points Q and Y of (Ineffective Assistance of Counsel), any statements I may have made in the interview with detectives would have been illegal obtained; not just in the manipulation of my Miranda rights; right to an attorney; but also, and more severely, in the coercion used before the interview started, - when I was left in the room, still handcuffed, for nearly 2 hours; and after the interview started, - while Det Smith attempted to manipulate conversation from me with mildly produced suggestions that I'd have to sit longer if I chose to wait for an attorney to be contacted. –[Which was suggested to be awhile, 'since all the attorneys were out golfing, and such'.] My counsel failed to make notice of such facts; and during trial, failed in their capacity as my defense counsel by neglecting their duties as attorneys, when they did not question, nor investigate further the facts brought about in this point, as well as points Q and Y. The court responded

to Q and Y.above. None of the additional comments in Z make any difference because the court suppressed the incriminating statements made by McDermott during his interview.

1. "Counsel failed in their capacity as my defense counsel by not arguing, or pushing, further for the dismissal of questioned jurors concerning one particular juror whom tainted the view of other surrounding jurors by quoting rumors she had heard about my supposed guilt. Just the fact that the other jurors were questioned about the incident, is a provider for bias-since it is likely those jurors will form personalized feelings without revealing such. My counsel should have pushed for a mistrial, or for those jurors to be replaced. In this, my counsel neglected their duties as defense counsel." McDermott appears to imply wrongdoing by jurors. All jurors chosen were individually questioned regarding any bias or as to what they may have heard. McDermott fails to point to one juror who may have been influenced by another juror and has provided no admissible evidence from a juror that this happened. He is only speculating.

2. "My appellate attorneys failed in their capacity as my defense counsel by not proving further, the existence of prejudice and bias of the court, in their case. Where, even though they did prove the existence of prejudice, they should have investigated further into my case, so as to back - with more solid evidence – their claims of a non-neutral, non detached, prejudicial, and biased magistrate. I have uncovered such evidence, and I am neither an attorney, nor do I fully understand much of this process. This proves that my counsel neglected their duties as appellate attorneys. And in this, failed in their capacity as my attorneys. With said provided information, in all points, and in concordance with, and with aide of, the Professional Rules of Conduct, the ineffectiveness of my counsel if shown and is proven."

McDermott's alleges he has uncovered evidence reflecting bias by the court. The court assumes he is referring to his general claims wherein he states the court showed bias during the trial and sentencing. The court has addressed those claims. At the sentencing hearing, the court did form an opinion regarding McDermott and his involvement in the murder of Mr. Street. However, there is absolutely no evidence to indicate the court was biased against him during his trial. This was a death penalty case. The court conscientiously ensured McDermott's right to a fair trial, even making a ruling that prejudiced the state's right to a fair trial by allowing Dr.

Froming to testify although she had not been disclosed to the state in advance of the trial. The court also each day required each juror to sign an affirmation that they had not violated the court's order not to receive outside information or to discuss this case with anyone.

III.

PRO SE REQUEST FOR DISCOVERY

McDermott filed a pro se request for discovery on May 24, 2010. McDermott is now represented by counsel. His counsel will determine what additional discovery is needed and can make any appropriate motions..

IV.

CONCLUSION AND NOTICE OF INTENT TO DISMISS

On the basis of the application and the present record before it, the Court is satisfied that petitioner is not entitled to post-conviction relief and that no purpose would be served by any further proceedings. Petitioner is hereby granted twenty (20) days to reply to the proposed dismissal of this action. In light of the reply, or on default thereof, the Court may order the application dismissed or grant leave to file an amended application, or direct that the proceedings otherwise continue.

In the alternative, Petitioner may wait until the status conference to be scheduled in this case to advise the court of how he will reply to the court's Notice of Intent to Dismiss. The court anticipates defense counsel may need more time than the standard 20 days set by statute. The status conference will be held with the court, the prosecutor and the conflict attorney appointed to represent Mr. McDermott. The purpose thereof will be to determine administratively the next step, if any to be taken in this case.

IT IS SO ORDERED.

Dated this 24th day of May, 2010.

Darla S. Williamson

Darla Williamson
District Judge